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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-382

UNITED STATES OF AMERICA, - - **Petitioner**

versus

FINLEY COAL COMPANY and CHARLES FINLEY, - - - - **Respondents**

On Petition For A Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The United States has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit which affirmed an order of the District Court dismissing Count VII of a pending indictment charging Finley Coal Company, a partnership, and Charles Finley, the partner in general supervision, with violating (1) interim mandatory safety standards which are part of the Federal Coal Mine Health and Safety Act of 1969, Pub. L.

91-173, Dec. 30, 1969, 83 Stat. 742, 30 U.S.C. §§ 801-960, and (2) "Mandatory Health and Safety standards amended and revised" promulgated by the Secretary of the Interior under the provisions of that Act.[1]

ARGUMENT

THE REGULATIONS PROMULGATED BY THE SECRETARY OF THE INTERIOR ARE INVALID BECAUSE THE SECRETARY FAILED TO FOLLOW THE PROCEDURES REQUIRED UNDER 30 U.S.C. § 811 IN DEVELOPING AND REVISING MANDATORY SAFETY STANDARDS

I. The Rulemaking Authority Conferred by the Federal Coal Mine Health and Safety Act of 1969.

The Federal Coal Mine Health and Safety Act of 1969 (hereinafter referred to as the "Act") was enacted by Congress after extensive debate in both houses and after a conference report that reconciled the differences between the Senate bill and the House bill. Because it did not have the expertise to establish specific and workable health and safety standards applicable to underground coal mines in all parts of the country, Congress provided in the Act that the standards enacted by it were interim standards and directed that the Secretary of the Interior "shall" promulgate improved standards and, in so doing, "shall" consult with specified government officials and other interested government agencies, representatives of the coal in-

[1]The penalty for willful violation of a mandatory health or safety standard is one year imprisonment, a fine of $25,000 or both. 30 U.S.C. § 819(b).

dustry, and other interested persons and organizations, with the opportunity for a public hearing if requested. 30 U.S.C. § 811. The Petitioner admits that consultations within government were not undertaken and that the judgment of the Court of Appeals is correct if, in promulgating the regulations in issue, the Secretary was required to comply with the procedures under 30 U.S.C. § 811.

The Act contains three separate and different grants of rulemaking authority. Section 101 of the Act, 30 U.S.C. § 811, provides both a mandate and the procedure for the promulgation and revision of mandatory health and safety standards under the Act. Section 811(a) provides in part:

> "The Secretary shall, in accordance with the procedures set forth in this section, develop, promulgate and revise, as may be appropriate, improved mandatory safety standards . . ."

30 U.S.C. § 811(c) provides as follows:

> "In the development and revision of mandatory safety standards, the Secretary shall consult with the Secretary of Health, Education, and Welfare, the Secretary of Labor and with other interested Federal agencies, appropriate representatives of State agencies, appropriate representatives of the coal mine operators and miners, other interested persons and organizations, and such advisory committees as he may appoint. Such development and revision of mandatory safety standards shall be based upon research, demonstrations, experiments, and such other information as may be appropriate.

> In addition to the attainment of the highest degree of safety protection for miners, other considerations shall be the latest available scientific data in the field, the technical feasibility of the standards, and experience gained under this and other safety statutes."

The second grant of rulemaking authority is contained in section 301(d) of the Act, 30 U.S.C. § 861(d), and provides as follows:

> "In any case where the provisions of Sections 862 to 878, inclusive, of this title provide that certain actions, conditions, or requirements shall be carried out as prescribed by the Secretary, or the Secretary of Health, Education and Welfare, as appropriate, the provisions of Section 553 of Title 5 shall apply unless either Secretary otherwise provides. Before granting any exception to a mandatory safety standard as authorized by this subchapter, the findings of the Secretary or his authorized representative shall be made public and shall be available to the representative of the miners at the affected coal mine."[2]

The third grant of rulemaking authority is found in section 508 of the Act, 30 U.S.C. § 957, which provides:

> "The Secretary, the Secretary of Health, Education, and Welfare and the panel are authorized to issue such regulations as each deems appropriate to carry out any provision of this Chapter."

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[2]Section 553 of Title 5 referred to in section 861(d) is part of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

The courts have traditionally construed different sections of the same statute *in pari passu*. All parts of the Act must be considered, compared and construed together. *Hellmich* v. *Hellman*, 276 U. S. 233 (1928).

Section 811(c) is the general formal rulemaking procedure which the Secretary "shall" follow in the "development and revision of mandatory safety standards." Sections 861(d) and 957 are limited grants of rulemaking authority and are insufficient authority for the development and revision of mandatory safety standards. Section 861(d) is a more informal procedure for an entirely different and strictly limited purpose, *i.e.*, it authorizes the Secretary to provide for "certain actions, conditions or requirements" when such directives are provided for in sections 862 to 878, inclusive. More simply stated, this section merely authorizes the Secretary to take any action which he is specifically commanded to perform in sections 862 through 878.

Section 957, on the other hand, is authority for administrative rulemaking only. It is codified under subsection 5—ADMINISTRATIVE PROVISIONS—and the legislative history of the Act shows conclusively that Congress did not intend section 957 to apply in establishing safety standards. In the section-by-section analysis contained in the Senate Committee Report it is stated that "where administrative regulations are needed, the provisions of Section 409 (now section 957) of this act would apply." Senate Report No. 91-411, 91st Congress, 1st Session, 87 (1969). Similarly, in the House Report it is stated that section 408 of the Act as passed by the House (now section 957) "au-

thorizes the Secretary to issue administrative regulations to carry out the act." H.R. Rep. No. 91-563, 91st Congress, 1st Session, 618 (1969). Thus, it was clearly the intention of both the Senate and the House to authorize the Secretary under section 957 only to issue regulations necessary to carry out the administrative requirements of the Act.

Since section 957 is silent on the question of notice and consultative and hearing procedure, the Secretary must look to the Administrative Procedure Act (5 U.S.C. § 553) for these requirements. Section 553 itself provides that when a statute by its terms provides for a hearing section 553 is inapplicable. It follows that section 957, since it is dependent on section 553, confers no greater authority on the Secretary than does section 861(d) which also is dependent on section 553.

II. The Act and Its Legislative History Establish That Criminal Prohibitions Were To Be Contained in Mandatory Standards To Be Promulgated Only After Compliance With Section 811.

The Act and the extensive legislative history which underlies it display an undeviating Congressional intent that the criminal prohibitions were to be contained in mandatory health and safety standards and that these standards were to be promulgated only after the Secretary of the Interior had complied with the consultative procedures contained in Section 101 of the Act, 30 U.S.C. § 811. This Congressional intent is clearly shown in the following sections of the Act:

§ 801. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSE.

"(g) it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education and Welfare and the Secretary of the Interior to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal miners; . . ."

§ 802. DEFINITIONS

"(1) 'mandatory health or safety standard' means the interim mandatory health or safety standards established by subchapters II and III of this chapter, and the standards promulgated pursuant to subchapter I of this chapter;"

§ 804. INTERIM COMPLIANCE PANEL—ESTABLISHMENT: COMPOSITION.

"(a) There is hereby established the Interim Compliance Panel which shall be composed of five members as follows:

(Assistant Secretary of Labor and others)

SUBCHAPTER I—HEALTH AND SAFETY STANDARDS

§ 811. PROMULGATION AND REVISION OF MANDATORY HEALTH AND SAFETY STANDARDS—POWER OF SECRETARY; TRANSMITTAL.

"(a) The Secretary shall, in accordance with the procedures set forth in this section, develop, promulgate, and revise, as may be appropriate, improved mandatory safety standards for the protection of life and the prevention of injuries in a

coal mine, and shall, in accordance with the procedures set forth in this section, promulgate the mandatory health standards transmitted to him by the Secretary of Health, Education and Welfare."

* * *

"(c) In the development and revision of mandatory safety standards, the Secretary shall consult with the Secretary of Health, Education, and Welfare, the Secretary of Labor, and with other interested Federal agencies, appropriate representatives of State agencies, appropriate representatives of the coal mine operators and miners, other interested persons and organizations, and such advisory committees as he may appoint."

SUBCHAPTER II—INTERIM MANDATORY HEALTH STANDARDS

§ 841. MANDATORY HEALTH STANDARDS FOR UNDERGROUND MINES; ENFORCEMENT; REVIEW; PURPOSE.

"(a) The provisions of sections 842 through 846 of this title and the applicable provisions of section 878 of this title shall be interim mandatory health standards . . ."

SUBCHAPTER III — INTERIM MANDATORY SAFETY STANDARDS FOR UNDERGROUND COAL MINES

§ 861. MANDATORY SAFETY STANDARDS FOR UNDERGROUND MINES—COVERAGE; ENFORCEMENT; REVIEW

"(a) The provisions of sections 862 through 878 of this title shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the

Secretary under the provisions of section 811 of this title . . .

"(b) The purpose of this subchapter is to provide for the immediate application of mandatory safety standards developed on the basis of experience and advances in technology and to prevent newly created hazards resulting from new technology in coal mining. The Secretary shall immediately initiate studies, investigations, and research to further upgrade such standards and to develop and promulgate new and improved standards promptly that will provide increased protection to the miners. . . .

"(c) (Provision for public hearing)"

The intention of Congress is consistently expressed throughout the Act that it was enacting interim standards only and that the Secretary[3] would promulgate revised and improved standards after consultation with designated groups and opportunity for a public hearing.

This intent as expressed in the Act is confirmed by the legislative history. The Legislative History, Federal Coal Mine Health and Safety Act, H.R. Rep. No. 91-563, Committee on Education and Labor, 91st Congress, 1st Session, page 585 contains the following:

"Subsection (a) of this section (U.S.C. 811) requires the Secretary, in the manner described later, to develop, promulgate, and revise mandatory safety standards for the protection of life and the prevention of injuries in coal mines subject to the Act."

* * *

[3]Respondents are not charged with violating any health standard so the word "Secretary" as used herein means the Secretary of the Interior.

"Subsection (b) provides that when he develops mandatory safety standards, the Secretary must consult with interested persons and organizations . . ."

* * *

"Subsection (f) provides that the Federal Coal Mine Health and Safety Board of Review shall, as soon as a matter is referred to it, issue notice and hold a public hearing. Within 60 days after it has finished the hearing, the Board must issue a report to the Secretary setting forth findings of fact and appropriate recommendations."

At page 653 of the same publication appears the following:

"The flexibility afforded in the establishment of mandatory health and safety standard (*sic*) by Title I of the bill is not accomplished at the expense of either the operator or the miner. An elaborate system of development, consultation, publication, notice, hearings, and review—administrative and judicial—is provided."

At page 1041 of the same publication we find this:

"5. The Senate bill provided that, where the safety standards in this title provide that the Secretary prescribe how certain actions, conditions, or requirements be carried out, the rulemaking provisions of 5 U.S.C. 553 will apply, unless the Secretary otherwise provides. The House amendment had no comparable provision. The conference agreement adopts the Senate provision with a modification to recognize that the Secretary of Health, Education, and Welfare also needs this

authority. This provision is not intended to apply when a safety mandatory standard is being proposed. In lieu of the rulemaking provisions, the Secretary could utilize the procedures of section 101."

At page 726 of this same publication is a statement by Congressman Dent of Pennsylvania who, as Chairman of the Subcommittee, Education and Labor, House of Representatives, did much of the spade work in drafting the bill:

"A number of mandatory safety standards in this title are written in broad general language, such as those relating to the transportation of men and materials, fire protection, permissiblity, and welding. The committee considered it unnecessary at this time, to write into the bill detailed requirements in these cases, since present provisions of the Bureau's code, interpretations, regulations, and instructions which cover these matters in very great detail will still be preserved under this act so long as they do not conflict or are not inconsistent with the provisions of this act. The committee, however, expects that the Bureau of Mines will carefully review all of these and quickly improve and revise them, and publish them as mandatory standards in order to insure adequate safety to the miners. This comment is of particular importance in the case of the code which has not been revised since 1953. Further, if a particular item in the code or any of these publications is of significance from a safety standpoint it should be published as a standard."

The foregoing makes it abundantly clear that mandatory standards which would form the basis of a criminal prosecution were to be promulgated by the Secretary only after compliance with the consultative provisions of section 811.

III. In Promulgating the Regulations in Issue, the Secretary Was Engaged in the Development and Revision of Mandatory Safety Standards and Was Required to, But Did Not, Comply With the Provisions of Section 811(c).

Count VII of the indictment charged violations of 30 U.S.C. § 864(a) and the regulations codified at 30 C.F.R. § 75.400. Section 864(a) provides that coal dust, including float coal dust, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate. Regulation § 75.400-1 defines the terms coal dust, float coal dust, and loose coal. Regulation § 75.400-2 requires the establishment and maintenance of a "program for regular cleanup and removal of accumulations of coal and float coal dusts, loose coal, and other combustibles" which program shall be available to the Secretary or his authorized representative.

The critical question becomes whether the Secretary, in promulgating these regulations, was engaged in the "development and revision of mandatory safety standards"? If so, the formal rulemaking procedure set out in section 811(e) had to be followed, irrespective of any other statutory authority. Section 811(e) makes apparent on its face that Congress has carved out of

sections 861(d) and 957 any rulemaking power that deals with either the development or revision of these mandatory safety standards.

In promulgating these regulations, the Secretary published on November 20, 1970, some forty-five (45) printed pages headed "Part 75—Mandatory Safety Standards, Underground Coal Mines" (Federal Register, Volume 35, No. 226—30 C.F.R. Part 75). The conclusory words in the headnote of the Federal Register in which the regulations are published are these: "*Mandatory Health and Safety Standards, Underground Coal Mines, amended and revised as set forth below is (sic) herewith promulgated* and shall become effective upon publication in the Federal Register." (Emphasis added.) The front page of this publication reads as follows:

"TITLE 30—MINERAL RESOURCES
Chapter I—Bureau of Mines
Department of the Interior

Subchapter O—Coal Mine Health and Safety

PART 75—MANDATORY SAFETY STANDARDS, UNDERGROUND COAL MINES

"Pursuant to the authority contained in paragraph (d) of section 301 of the Coal Mine Health and Safety Act of 1969 (Public Law 91-173), there was published in the FEDERAL REGISTERED (sic) for August 14, 1970 (35 F.R. 12911), a notice of proposed rulemaking setting forth proposed amendments and a new Subpart S, 'Approved Books and Records,' to Part 75 of Title 30, Code of Federal Regulations, regarding mandatory health and safety standards in underground coal mines.

"Interested persons were afforded a period of 30 days from the date of publication of the notice in which to submit written comments, suggestions, or objections to the proposed amendments and the proposed new Subpart S. The period for submitting written comments, suggestions or objections was subsequently extended to September 30, 1970, by a notice published in the FEDERAL REGISTER for September 5, 1970 (35 F.R. 14146). Approximately 21 associations, companies, and individuals submitted comments, suggestions or objections. All were given careful consideration. A summary of the comments and an explanation of the actions taken with respect to them will be prepared by the Bureau of Mines and will be available 30 days from the date of this publication in the Office of the Deputy Director for Health and Safety, Room 4512, Bureau of Mines, Department of the Interior, Washington, D. C. 20240.

"Some of the standards have been revised as suggested; in other instances, revisions were made in view of the comments received. Some of the suggestions could not be adopted because they were contrary to the statutory provisions.

"Part 75 of Title 30 Code of Federal Regulations, Subchapter O—Coal Mine Health and Safety—Mandatory Health and Safety Standards, Underground Coal Mines, amended and revised as set forth below is herewith promulgated and shall become effective upon publication in the FEDERAL REGISTER.

Walter J. Hickel
Secretary of the Interior

November 23, 1970."

In the forty-five pages that follow, the Secretary sets forth the interim mandatory standards section by section and, for the most part, puts meat on the bones of the Act by adding more specific requirements than those contained in the Act. The Secretary could not have made it any plainer what kind of rulemaking he was engaged in. The Secretary thus followed the Congressional mandate by promulgating revised mandatory safety standards, but he studiously avoided the consultative procedures and the opportunity for public hearing which Congress had so clearly spelled out in the Act. This was no insignificant error for, in proceeding as he did, he was establishing standards the violation of which could result in the imposition of criminal sanctions. The complaint of the United States that the ruling below will frustrate criminal and civil penalty proceedings and will render numerous violations unpunishable is inapposite. It begs the question whether the regulations, having been promulgated as they were, can be legal imperatives which can serve as a basis for a criminal prosecution and conviction. The further contention that the Secretary was merely defining terms and interpreting the manner in which the sections would be enforced is absurdly simplistic. What he purported to do went to the very substance of the Act—setting the limits of coal mine safety as a matter of law.

It is therefore clear that the Secretary accomplished his announced purpose, *i.e.*, the regulations in issue in fact constitute revised mandatory safety standards. Petitioner attempts to minimize the coal dust regula-

tions at 30 C.F.R. § 75.400-1 as definitional because they lack "novelty" in that they were first issued in 1911 and were reaffirmed in 1950 by the Bureau of Mines. But, in setting the standards of what is legal and what is criminal in a coal mine, section 811(c) enjoins him to consider "the latest technical data in the field, the technical feasibility of the standards, and experience gained under this and other safety statutes." Surely the technology of coal mining has changed since 1911. Perhaps the regulations should be novel. Different tools, different means for circulating air, and different extraction procedures all may influence the matter of what is to be considered coal dust. Those agencies and persons designated in section 811(c) may have constructive suggestions about what is to be considered coal dust. But the Secretary has had the benefit of none of these considerations—considerations which Congress required him to apply in drafting standards—because he unilaterally promulgated standards and now seeks to impose them as standards of criminality. This is exactly the kind of rulemaking which requires consultation pursuant to section 811(c).

Similarly, 30 C.F.R. § 75.400-2 requires that a "program for regular cleanup" of coal dust must be established and maintained and that "such program shall be available to the Secretary or his authorized representative." The statute, however, requires only that the dust be "cleaned up and not permitted to accumulate." A coal operator, therefore, could comply with the command of the statute but not be able to show that the cleanup was the result of a regular pro-

gram which he could produce for the Secretary. Of this, the Court of Appeals said, "We conclude that 30 C.F.R. § 75.400-2 changed the standard in § 864(a)."

IV. The Regulations in Issue Cannot Be Upheld Under Section 957.

In drafting the Act, Congress chose not to rely exclusively upon the existing rulemaking provisions already available in the Administrative Procedure Act. The following statement by the House managers of the Act is informative (H.R. Rep. No. 91-563, Committee on Education and Labor, 91st Congress, 1st Session, 1041 (1969)):

> "This provision (5 U.S.C. 553) is not intended to apply when a mandatory safety standard is being proposed. In lieu of the rulemaking provisions, the Secretary could utilize the procedures of section 101."

The United States relies primarily upon the argument that the regulations in issue are interpretative of statutory standards and were promulgated under section 957, apparently no longer seriously contending that the regulations in issue may be upheld under section 861(d). While the distinction between interpretative or legislative regulations enjoys some judicial acceptance in cases arising under the Administrative Procedure Act, it is not pertinent here in dealing with a special and unique statute. As stated by the District Court, this distinction "should not be applied to the construction of this law since all disputed regulations

are cited in the indictment, together with statutory provisions, for maintaining the criminal prosecution."

The applicability of *Textile Mills Securities Corporation* v. *Commissioner*, 314 U. S. 326 (1941), cited by the Government, is dependent upon the Government's thesis that section 957 amounts to a grant of general rulemaking authority to the Secretary. *Textile Mills* did not involve a criminal prosecution or a statute in which Congress had explicitly established and required a consultative procedure peculiar to the industry. The authority of the Secretary to promulgate definitional regulations is not, per se, in issue in this case except when the Secretary seeks to invade the area of mandatory safety standards. While the mandatory safety standards which pertain to Count VII of the indictment happen to be cast in part in definitional language, it is substance and not verbiage which determines the issue. *Pharmaceutical Manufacturers Association* v. *Finch*, 307 F. Supp. 858 (D. Del. 1970).

In *Kelly* v. *United States Department of the Interior*, 339 F. Supp. 1095 (E.D. Cal. 1972), the court considered a department regulation which the Secretary had published without giving the thirty-day notice required by the Administrative Procedure Act. The Secretary had claimed the "good cause" exception to the notice rule, but failed to give adequate supporting reasons for using the exception. Finding that the regulation had been promulgated illegally, the court made an observation which is even more telling in the present case in which Congress has commanded more explicit consultation than that provided for in the Administrative Procedure Act:

> "Voiding the present regulations on what at first blush appears to be a technicality is not as pointless as it may seem. We believe that the 30-day notice rule serves an important interest, the right of the people to present their views to the government agencies which increasingly permeate their lives. The interchange of ideas between the government and its citizenry provides a broader base for intelligent decision-making and promotes greater responsiveness to the needs of the people, especially in cases such as this where Congress has only roughed in its program." *Id.* at 1102.

It is clear that Congress considered even the dialogue provided for in the Administrative Procedure Act inadequate for regulation of coal mine safety, since it specifically provided for a more rigorous consultative procedure. Nevertheless, the basic judicial reasoning in *Kelly* is consistent with the Congressional intent expressed in the Federal Coal Mine Health and Safety Act. See also *Texaco, Inc.* v. *Federal Power Commission*, 412 F. 2d 740 (3d Cir. 1969).

Even if the term "interpretative" is thought to have significance in analyzing what the Secretary did, the reasonable meaning of that term is totally incompatible with the effect of the specific regulations in issue here. By establishing "No. 200" or "No. 20" seive standards in 30 C.F.R. § 75.400-1, the Secretary purports to establish the point at which a criminal case is made out; and in 30 C.F.R. § 75.400-2, he establishes an affirmative requirement not stated in the statutory standards at all. The statutory interim standard requires that coal dust be "cleaned up" and not "permitted to accumulate," but under C.F.R.

§ 75.400-2, the operator could have accomplished this and still be subject to a criminal sanction for not having set up a "regular cleaning program." This subsection obviously does not merely define a criminal offense, but rather, it establishes a new criminal offense.

The Government also argues that section 811(c) was intended to apply only to long term improvement in mine safety based upon new research and technology which could not be accomplished virtually contemporaneously with the effective date of the Act. Section 811(c) obviously was intended to authorize the Secretary to promulgate regulations to improve mine safety in the years to come. It is equally clear, however, that, in enacting section 811(c), Congress contemplated the immediate revision and upgrading of mandatory standards. 30 U.S.C. § 861(b) expressly provides that the Secretary "shall immediately initiate studies, investigations, and research to further upgrade such standards and to develop and promulgate new and improved standards promptly that will provide increased protection to the miners * * *."

That the regulations involved in this proceeding are not administrative in nature would thus seem to be beyond argument. They are substantive standards, violation of which will subject the operator to civil penalties and in some cases to criminal sanctions. They were referred to as standards by the Secretary when he promulgated them, and the Secretary has consistently treated the challenged regulations as constituting mandatory safety standards as is evidenced by the fact that their violation is charged in the pending prosecution.

CONCLUSION

Four years ago, Congress directed the Bureau of Mines to establish mandatory safety standards and itself established certain interim standards. The Secretary promulgated in the Federal Register what he termed revised mandatory standards. He has assessed against respondents civil penalties for alleged violation of these standards and has sought and obtained an indictment against respondents for allegedly violating them.[4] It is clear from the context of the Act that the Secretary was to proceed with dispatch in obedience to the Congressional mandate. Now, four years later, *there are no mandatory safety standards in the Federal Register unless the Secretary was promulgating mandatory safety standards on November 20, 1970, as he said he was.*

Respondents submit that the Secretary has attempted to comply with the Congressional mandate to promulgate standards but has failed to follow the required procedure. It would be fortuitious for the Secretary if this case were to be resolved so that what he has done would be allowed to stand without the inconvenience of having to do it the way he was told. Then the Bureau of Mines could persist indefinitely in its failure to engage in the consultation demanded by Congress. Congress made a careful legislative judg-

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[4]The Petitioner has tried to convey the impression that all criminal enforcement of mine safety is hanging in the balance in this case. Respondents, after some investigation, have learned of only one other criminal proceeding under the Act, *United States of America* v. *Consolidated Coal Company*, 6th Cir. 1974 (Nos. 73-2086, 73-2085).

ment concerning the manner in which the discretion delegated to the Secretary was to be exercised, and the Secretary must abide by that judgment. The thoughtful opinions of the District Court and the Court of Appeals correctly place upon the Secretary the responsibility Congress intended him to bear. The petition for certiorari should be denied.

Respectfully submitted,

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